Aboriginal Customary Law: A Source of Common Law Title to Land

Ulla Secher

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Aboriginal Customary Law: A Source of Common Law Title to Land contributes to the discussion of property law in Australia in two primary ways. First, it provides a thorough analysis of the historical and contemporary context of indigenous land rights in Australia. Second, it suggests that *common law* indigenous land rights are able to exist within this context.

Secher's main proposal is that the decision in *Mabo*[1] laid the foundation for the recognition of Aboriginal customary law as a source of common law title to land. She argues that the High Court's rejection of the view that sovereignty conferred absolute beneficial ownership of all land on the Crown and development of the concept of radical title creates scope for such a common law claim, whether title arose before or after sovereignty.

Although operating alongside native title, one of the main practical benefits of Secher's hypothesis is that it would allow recognition of a greater range of indigenous land rights. Secher refers to the *Darug*[2] case as an illustration of land rights denied under native title that would arguably be recognised by a customary law source of common law title. As such, title would be a creature of – rather than merely recognised by – the common law, it would be less vulnerable than native title to extinguishment and more adaptable than native title to social and cultural changes. Another practical benefit is that the test for proof of common law customary title may be more easily met by oral evidence and the operation of common law presumptions than a native title claim.

Secher primarily develops her own work in this area.[3] Her interpretation and analysis of pre and post-*Mabo* authorities – as well as Australian and overseas legal history – is thorough, and her research contributes to gaps in existing historical literature. The true contribution of Secher's work, however, is clearly her formulation and application of an alternative foundation for Aboriginal land title. Through a process that could be described as 'backwards induction', Secher carefully analyses the impact

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[1] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
[2] *Gale v Minister for Land & Water Conservation for New South Wales* [2004] FCA 374.
[3] See, eg, Ulla Secher, 'Implications of the Crown's radical title for statutory regimes regulating the alienation of land: 'Crown Land' v 'Property of the Crown' Post-Mabo' (2008) 34(1) *Monash University Law Review* 9; Ulla Secher, 'The doctrine of tenure in Australia post-Mabo: replacing the 'feudal fiction' with the 'mere radical title fiction' – Part I' (2006) 13(2) *Australian Property Law Journal* 140.

of *Mabo* on the Australian system of land law. She notes that the High Court in *Mabo* provided a result so far as Aboriginal land rights were concerned, but that crucial questions went unanswered and important reasoning went unexplained. Secher elucidates some of the reasoning behind the development and application of radical title and its impact on contemporary Australian land law. She refers to the pre-*Mabo* understanding of land law, the distinctions in reasoning in *Mabo*, subsequent reasoning in cases such as *Wik*[4] and *Ward*[5], and developments in both the Australian context and in the approach of other jurisdictions. Secher's analysis of the doctrine of tenure, radical title and aboriginal land rights in Canada is particularly important. By discussing the development of the Canadian jurisprudence and the operation of these principles on substantiating a common law claim based on customary title, Secher demonstrates the possible content and application of such title in Australia.

Secher's reasoning is clear. While the later parts of Secher's work formulate her own hypothesis, the reasoning in Part I is a relatively detailed summary of pre-*Mabo* land law, and contributes well to legal history.

Secher's work is, however, quite long for a book of this kind. The overall accessibility of the book may have been improved if it were more concise. Discussion of the development of the feudal doctrine of tenure, the effect of judicial notice of tenure on indigenous land rights and the meaning of 'radical title', for example, is quite extensive. Although Secher's analysis of the true definition of radical title is imperative to the crux of her conclusions later in the book, much of the earlier analysis could have been dealt with more briefly so as to not detract from the otherwise compelling nature of the work. Similarly, analysis of the case law is extensive and, overall, the book could have been improved by removing some of this description, using more concise language, or by greater use of headings. As it stands, it is easy for a reader to lose grasp of the importance of the case analysis, which may result in a lack of understating of some of the nuances of Secher's work.

Overall, *Aboriginal Customary Law: A Source of Common Law Title to Land* is an excellent book. It contributes an alternative source of indigenous land rights to an area of law that is rich with possibility for reform. Secher's work is innovative and well-reasoned. Whether or not her ultimate conclusion is accepted, her research provides many insights into Australian land law. Importantly, Secher's comparisons with other jurisdictions could have practical implications should a fitting case arise. While the length and language of Secher's work may at times be a barrier

[4] *Wik Peoples v Queensland* (1996) 187 CLR 1.
[5] *Western Australia v Ward* (2002) 213 CLR 1.

for some readers, this is a very minor drawback of an otherwise persuasive and engaging book.

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